Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-878

JAMES W. GILMARTIN, GILMARTIN DENTAL CORPORATION,
and
J. W. GILMARTIN, D.D.S., INC.,
Petitioners,

vs.

BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California in and for the Third Appellate District

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November 28, 1978.

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To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

James W. Gilmartin, Gilmartin Dental Corporation and J. W. Gilmartin, D.D.S., Inc., the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the Third Appellate District entered in the above-entitled case on July 12, 1978.

OPINIONS BELOW

The denial of the Petition for Hearing by the Supreme Court of the State of California is unreported and is printed in Appendix A hereto, *infra*, page A-1. The opinion of the Court of Appeal of the State of California in and for the Third Appellate District is unreported and is printed in Appendix B hereto, *infra*, pages B-1 and B-2. The judgment and findings of fact of the Superior Court of the State of California, in and for the County of Sacramento, is printed in Appendix C hereto, *infra*, pages C-1 to C-9.

JURISDICTION

The opinion of the Court of Appeal of the State of California in and for the Third Appellate District (Appendix B, *infra*, pages B-1 and B-2) was entered on July 12, 1978. A timely Petition for Hearing before the Supreme Court of the State of California was denied on September 7, 1978 (Appendix A, *infra*, page A-1). The jurisdiction of the Supreme Court is invoked under 28 United States Code § 1257(3).

QUESTION PRESENTED

Whether California Business and Professions Code § 1658.1 is repugnant to the due process and equal protection clauses of the United States Constitution, Fourteenth Amendment.

STATUTE INVOLVED

California Business and Professions Code § 1658.1 provides:

> "On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice, except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least fifty percent of the time during which such places of practice are open for the practice of dentistry."

The United States Constitution, Fourteenth Amendment, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, James W. Gilmartin, is a practicing dentist in the State of California. Petitioners, Gilmartin Dental Corporation and J. W. Gilmartin, D.D.S., Inc., are California professional corporations and hold a Certificate of Registration as such issued by respondent Board of Dental Examiners. All of the outstanding shares of stock in petitioners, Gilmartin Dental Corporation and J. W. Gilmartin, D.D.S., Inc., are owned by James W. Gilmartin, who is their managing director.

Petitioners presently own and operate two places of dental practice: 1749 Arden Way, Sacramento, California and 5514 Florin Road, Sacramento, California. On July 20, 1976, petitioners made application to respondent for permission to open a third, fourth and fifth dental office at various locations in California. On October 3, 1976, re-

spondent denied petitioners' application for the sole reason that petitioners admitted that Dr. Gilmartin would not be present in his third, fourth and fifth dental offices at least fifty percent of the time that it was open for the practice of dentistry. The basis for respondent's denial of petitioner's application was California Business and Professions Code § 1658.1, which provides that on or after September 21, 1963, no dentist may be allowed to have any additional place of practice, except that he may be permitted more than one place of practice, ". . . if he is in personal attendance at each place of practice at least fifty percent of the time during which such places of practice are open for the practice of dentistry."

Before and after the enactment of California Business and Professions Code § 1658.1, Title 16 of the California Administrative Code, § 1060, provided as follows:

> "The purpose of the rules of this article is to carry out the provisions of Article 3.5 of the Dental Practice Act and to facilitate, encourage and protect the public health, in the preservation of a close personal relationship between the applicant dentist and his patients at any additional office by preventing a division between the business and professional sides of the said dental practice and by fostering a unity of ownership, management, and control over the operative side of the practice."

Of the seventeen "healing arts" governed by the California Business and Professions Code, only dentists and optometrists are limited by law in the number of places of practice the individual practitioner may have. In particular, physicians are not so restricted, which enables Kaiser Health Plans, for example, to offer direct service prepaid

health plans at eleven Northern California locations for a single organization of physicians, the Permanente Medical Group. Yet the trial court found that in terms of the two-office limitation on the relationship with patients, there is no substantial difference between the practice of medicine and dentistry (Appendix C, *infra*, page C-6).

There has been a substantial demand for group health care delivery systems, including dentistry, in this country because such systems provide a more efficient, higher-quality care at a lower cost than the traditional "cottage" industry style of practice. The development of group practice of dentistry is effectively prevented by California Business and Professions Code § 1658.1 (Appendix C, *infra*, pages C-4 and C-5).

Petitioner's contention that California Business and Professions Code § 1658.1 violates constitutional due process and equal protection guarantees, was argued in the trial court action for a Writ of Mandate, and was determined adversely to petitioners because the trial court concluded that petitioners had failed to overcome the presumption of constitutionality which attached under the traditional standard of review (Appendix C, *infra*, page C-7). The same due process and equal protection contentions were raised on appeal to the Court of Appeal of the State of California in and for the Third Appellate District, and were determined adversely to petitioners by the reliance of that court on the decision of the Court of Appeal for the First Appellate District in *Naismith Dental Corporation v. Board of Dental Examiners*, 68 Cal.App.3d 253, hearing denied California Supreme Court, May 19, 1977 (Appendix D, *infra*, page D-1). Further, in the Petition for Hearing in

the Supreme Court of the State of California, the due process and equal protection arguments were again raised, but the Supreme Court of the State of California denied petitioner's request for hearing (Appendix A, *infra,* page A-1).

REASONS FOR GRANTING WRIT

This case concerns the rights of licensed dentists to practice their occupation free from unconstitutional restrictions limiting the number of offices in which they may practice. Initially, petitioner concedes the legitimacy of the legislative objective to ". . . preserve a close personal relationship between the applicant dentist and his patients . . .". The constitutional impropriety in California Business and Professions Code § 1658.1 relates to the *manner* sought to achieve an otherwise legitimate state objective.

In *Naismith Dental Corporation v. Board of Dental Examiners* (1977) 68 Cal.App.3d 253, hearing denied, California Supreme Court, May 19, 1977, upon which the decision in this case was based, the court applied the "rational relationship" or traditional standard of review in deciding that California Business and Professions Code § 1658.1 was not violative of equal protection and due process guarantees. Petitioner contends that the practice of one's profession, once licensed to so practice, touches upon a "fundamental interest" and the more rigorous "strict scrutiny" standard should apply.

The rationale in *Naismith, supra,* for application of the traditional standard was based upon *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, where the California Supreme Court held that a "cognizable 'fundamental interest' in the right to pursue employment . . . is clearly limited

in scope to 'the common occupations of the community' and should not be applied to professions whose technical complexity and intimate relationship to the public interest and welfare counsel greater deference to the legislative judgment." (11 Cal.3d, page 18) While this distinction may be persuasive with respect to occupational licensing cases, this case involves regulation of professionals *already licensed* and petitioner contends the above distinction is not determinative. Rather, the governmental interference contained in California Business and Professions Code § 1658.1 should only be sustained upon the showing of a compelling state interest and that the classification itself is necessary to further its purposes.

There exists a constitutionally protected right to continued employment for purposes of procedural due process (*Arnett v. Kennedy* (1974) 416 U.S. 134, 40 L.Ed.2d 15; *Perry v. Sindermann* (1972) 408 U.S. 593, 33 L.Ed.2d 570; *Board of Regents v. Roth* (1972) 408 U.S. 564, 33 L.Ed.2d 548). If such a right has constitutional recognition for one purpose, it should be consistently recognized as "explicitly or implicitly guaranteed by the Constitution", for purposes of equal protection standards and thus satisfy the fundamental interest test established in *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, at page 33, 36 L.Ed.2d 16, at page 43.

Alternatively, petitioner contends that even under the "rational relationship" standard of review, California Business and Professions Code § 1658.1 fails to satisfy equal protection and due process guarantees. The difficulty inherent in the personal attendance standard contained in

section 1658.1 is that it does not insure or even require *any* supervision of patients.

The equal protection clause (United States Constitution, Fourteenth Amendment) is intended to protect against classifications that draw irrational distinctions between indistinguishable classes, yet that is exactly what section 1658.1 does. Among a class of dentists only, it impermissibly applies a personal attendance standard only to dentists with more than one office. Among the class of seventeen "healing arts" practitioners regulated by statute in California, it applies the personal attendance standard only to dentists and optometrists (California Business and Professions Code § 3077(f)). As the trial court found (Appendix C, *infra,* page C-4), dentists and physicians are an indistinguishable class in terms of the two-office limitation, yet the two-office prohibition does not apply to physicians. While it is true the legislature need not apply the same regulations to all professional classes (*Semler v. Dental Examiners* (1935) 294 U.S. 608), the statutory distinctions must nevertheless be rationally related to the legislative objective.

The due process clause (United States Constitution, Fourteenth Amendment) and the requirements of substantive due process prohibit arbitrary and unreasonable legislation. For an encroachment by the state upon a private interest to withstand the test of due process, it must appear first that the public interest requires such interference and second, that the *means* utilized to effect the interference are reasonably necessary for the furtherance of that interest (*Lochner v. New York* (1905) 198 U.S. 45). The personal attendance standard in section 1658.1 utilizes a means

which bears no rational relationship to the goal of close supervision.

The degree of supervision depends on the number of patients actually treated, not the number of locations in which treatment occurs. A dentist who treats ten patients at ten locations would more closely supervise their dental care than a dentist who treats one thousand patients in one location. Yet section 1658.1 regulates only the number of treatment locations, and, in fact, doesn't even require a proprietor-dentist to personally treat a single patient. Such a statutory means of regulation can only be characterized as arbitrary and irrational, and thus violative of substantive due process.

While past decisions of this court have sustained a personal attendance requirement for optometrists (*Roschen v. Ward* (1929) 279 U.S. 337), and articulated a position of judicial restraint (*Williamson v. Lee Optical Co.* (1955) 348 U.S. 483) regarding regulation of professions, petitioner submits that California Business and Professions Code § 1658.1 warrants no such judicial deference. The multiple-office, personal attendance standard bears *no* rational relationship to the stated "close supervision" objective.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

TURNER AND SULLIVAN

A PROFESSIONAL CORPORATION

By JAMES P. CORN

Attorneys for Petitioners.

(Appendices Follow)

Appendices

APPENDIX A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

September 7, 1978

I have this day filed Order HEARING DENIED.

In re: 3 Civ. No. 17172

Gilmartin

vs.

Board of Dental Examiners

Respectfully,
G. E. Bishel, Clerk

APPENDIX B

Not to Be Published In Official Reports

In the Court of Appeal of the
State of California

Third Appellate District
(Sacramento)

3 Civil No. 17172
(Super. Ct. No. 2564484)

James W. Gilmartin, Gilmartin Dental Corporation, and J. W. Gilmartin, D.D.S., Inc.,

Plaintiffs and Appellants,

v.

Board of Dental Examiners of The State of California,

Defendant and Respondent.

[Filed July 12, 1978]

OPINION

Plaintiffs appeal from a judgment which denied their application for a peremptory writ of mandate.

Plaintiffs contend Business and Professions Code section 1658.1[1] unconstitutionally denies both due process and

[1]Business and Professions Code section 1658.1 provides:
"On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice, except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry."

equal protection of the laws. These contentions were considered and rejected by the Court of Appeal (First District) in Naismith Dental Corp. v. Board of Dental Examiners (1977) 68 Cal.App.3d 253. The Supreme Court denied an application for hearing May 19, 1977. We need not express an opinion on the wisdom of the statute in question; and based upon the holding in *Naismith, supra*, we find the statute to be constitutional.

The judgment is affirmed.

Evans, J.

We concur:

Puglia, P. J.

Reynoso, J.

APPENDIX C

In the Superior Court of the State of California
in and for the County of Sacramento

No. 256484 Dept. 10

James W. Gilmartin, Gilmartin Dental Corporation, and J. W. Gilmartin, D.D.S., Inc.,

Petitioners,

vs.

Board of Dental Examiners of the State of California,

Respondents.

[Filed August 30, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Honorable Joseph A. DeCristoforo on June 29 and 30, 1976, pursuant to the alternative petition for writ of mandate. Turner and Sullivan, Attorneys at Law, by Robert J. Sullivan, appeared for petitioners; Evelle J. Younger, Attorney General, by Joel S. Primes, Deputy Attorney General, appeared for respondents.

The respondents' motion for judgment on the pleadings was taken under submission and is now denied. The trial was then continued by stipulation for 120 days to allow petitioners the opportunity to file an application with the respondent, Board of Dental Examiners, for an additional

place of practice pursuant to Business and Professions Code section 1658.1. Petitioners filed their application with respondent Board for a third office and the Board denied said application.

On November 8, 1976, the Court ruled that the above-entitled matter will be governed by the ruling to be made in the matter of *Naismith Dental Corporation v. Board of Dental Examiners,* which was then pending in the Court of Appeal. The Court then dropped the above-entitled matter from the Court's calendar, to be restored upon motion of either party, after any ruling in the *Naismith* matter had become final. On June 9, 1977, the above-entitled matter was restored to the Court's calendar for June 28, 1977, based on the fact that the *Naismith* opinion had become final. On June 28, 1977, the Court denied the petition for writ of mandate pursuant to the authority of *Naismith Dental Corporation v. Board of Dental Examiners,* 68 C.A.3d 253. The case was heard and evidence was introduced. The matter was submitted to the Court for decision, and the Court being fully advised in the premises now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Petitioners are a California professional dental corporation and hold a certificate of registration as such issued by respondent Board of Dental Examiners. All of petitioners' outstanding shares of stock are owned by James W. Gilmartin, D.D.S., holding license No. 14759 issued by respondent.

2. Petitioners presently own and operate two places of practice; 1749 Arden Way, Sacramento, California, and 5514 Florin Road, Sacramento, California. Approximately six licensed dentists are employed by petitioners. On July 20, 1976, petitioners made application to respondent for permission to open a third office to be located at 3018 J Street, Sacramento, California; a fourth office to be located at 7200 Hammer Lane, Stockton, California, and a fifth office to be located at 984 Lincoln Street, Auburn, California. On October 3, 1976, respondent denied petitioners' application for the sole reason that petitioners admitted that Dr. Gilmartin would not be present in his third, fourth and fifth dental facilities at least 50 percent of the time that it was open for the practice of dentistry.

3. In his application, petitioner James W. Gilmartin submitted on an Anticipated Schedule of Personal Attendance that in his primary office on Arden Way, Sacramento, California, petitioner James W. Gilmartin anticipated personally spending twenty hours a week out of the forty-four hours a week the office was open for the practice of dentistry; in the second office on Florin Road, petitioner James W. Gilmartin anticipated spending eight hours a week out of the forty-four hours the office was open for the practice of dentistry; in the anticipated third office located at 3018 J Street, Sacramento, California, petitioner James W. Gilmartin anticipated personally spending four hours a week out of the forty-four hours that the office would be open for the practice of dentistry; in the fourth office to be located at 7200 Hammer Lane, Stockton, California, petitioner James W. Gilmartin anticipated personally spending four hours a week of the forty-four hours

that the office would be open for the practice of dentistry; in petitioner's fifth anticipated office to be located at 984 Lincoln Street, Auburn, California, petitioner anticipated personally spending four hours a week out of the forty-four hours a week that the office would be open for the practice of dentistry.

4. The basis for respondent's denial of petitioners' application is derived from Business and Professions Code section 1658.1 which provides that on or after September 21, 1963, no dentist may be allowed to have any additional place of practice, except that he may be permitted more than one place of practice, '. . . if he is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry."

This 50 percent requirement applies to each dentist holding any proprietary interest or managerial control in an unincorporated group, and to each dentist who is an officer, director, or shareholder of a professional corporation.

5. Of the seventeen "healing arts" governed by the Business and Professions Code, only dentists and optometrists are limited by law in the number of places of practice an individual practitioner may have. In particular, physicians are not so restricted, which enables Kaiser Health Plans, for example, to offer direct service prepaid health plans at eleven Northern California locations through a single organization of physicians, the Permanente Medical Group. There has been a substantial demand for group health care delivery systems (including den-

tistry) in this country because such systems provide more efficient, higher quality care at a lower cost than the traditional "cottage" industry style of practice. The development of group practice in dentistry in California is effectively prevented by Business and Professions Code section 1658.1.

6. In reality, the 50 percent requirement (weekly or otherwise) of Business and Professions Code section 1658.1, although often described as a "two-office limitation," prohibits any licensed dentist from operating more than *one* full-time office (unless he is subject to the "grandfather provisions of Business and Professions Code section 1658.3). If two offices are open during the same hours, it would be impossible for any dentist to be present in each one at least 50 percent of the time, unless he never took any time off for illness, vacation, or other reasons and, in addition, could transport himself instantaneously between the offices.

7. Before and after the enactment of Business and Professions Code section 1658.1, Title 16 of the California Administrative Code section 1050 provided as follows:

> "The purpose of the rules of this article is to carry out the provisions of Article 3.5 of the Dental Practice Act and to facilitate, encourage and protect the public health, in the preservation of a close personal relationship between the applicant dentist and his patients at any additional office by preventing a division between the business and professional sides of the said dental practice and by fostering a unity of ownership, management, and substantial direct proprietor supervision and control over the operative side of the practice."

8. In the interval since the enactment of Business and Professions Code section 1658.1, substantial changes have taken place in the operation and management of the business side of the practice of dentistry. Nowadays, much of the business and administrative services incident to the practice of dentistry, such as billing, record keeping, office management and the like, are delegated to non-dental personnel under contract with third parties or through personnel hired for that purpose by the dentist. As a result, the licensed dentist is able to devote more of his time and effort to treating patients, and the efficiency of the dental office is improved.

9. In terms of the two-office limitation on the relationship with patients, there is no substantial difference between the practice of medicine and dentistry.

CONCLUSIONS OF LAW

1. The writ of mandate is denied based on the final decision of the Court of Appeal for the First Appellate District in the matter entitled *Naismith Dental Corporation v. Board of Dental Examiners,* 68 C.A.3d 253. The same due process and equal protection arguments raised by petitioner Gilmartin were raised by Dr. Naismith. This Court follows the *Naismith* decision.

2. The applicable standard of review under equal protection analysis is the rational relationship test. No suspect classification or fundamental interest are involved in this matter.

3. Business and Professions Code section 1658.1 applies only to licentiates of respondent. It does not apply to any other practitioner of the healing arts.

4. Petitioners have not been denied equal protection of the law, since they have failed to overcome the presumption of constitutionality in that they have failed to show that the statute they attack has no rational relationship to the legislative purpose.

5. Petitioners have not been denied due process of law, since they have failed to overcome the presumption of constitutionality in that they have failed to show that no basis in fact for the law exists and that the Legislature could not in good faith believe that such a need exists.

6. The Court shall enter judgment denying the Petition for Writ of Mandate, discharging the Alternative Writ of Mandate and awarding respondent costs of suit incurred herein.

Dated: 8/30/77

(Seal)

Joseph A. DeCristoforo
Judge of the Superior Court

In the Superior Court of the State of California
In and for the County of Sacramento

No. 256484 Dept. 10

James W. Gilmartin, Gilmartin Dental Corporation, and J. W. Gilmartin, D.D.S., Inc.,

Petitioners,

vs.

Board of Dental Examiners of the State of California,

Respondents.

[Filed Aug. 30, 1977]

JUDGMENT

This cause came on regularly for hearing before the Honorable Joseph A. DeCristoforo on June 29 and 30, 1976, pursuant to the alternative petition for writ of mandate. Turner and Sullivan, Attorneys at Law, by Robert J. Sullivan, appeared for petitioners; Evelle J. Younger, Attorney General, by Joel S. Primes, Deputy Attorney General, appeared for respondents.

The respondents' motion for judgment on the pleadings was taken under submission and is now denied. The trial was then continued by stipulation for 120 days to allow petitioners the opportunity to file an application with the respondent, Board of Dental Examiners, for an additional place of practice pursuant to Business and Professions Code section 1658.1. Petitioners filed their application with

respondent Board for a third office and the Board denied said application.

On November 8, 1976, the Court ruled that the above-entitled matter will be governed by the ruling to be made in the matter of *Naismith Dental Corporation v. Board of Dental Examiners*, which was then pending in the Court of Appeal. The Court then dropped the above-entitled matter from the Court's calendar, to be restored upon motion of either party, after any ruling in the *Naismith* matter had become final. On June 9, 1977, the above-entitled matter was restored to the Court's calendar for June 28, 1977, based on the fact that the *Naismith* opinion had become final. On June 28, 1977, the Court denied the petition for writ of mandate pursuant to the authority of *Naismith Dental Corporation v. Board of Dental Examiners*, 68 C.A. 3d 253.

The Court examined the proof offered by the respective parties, the cause having been argued and submitted for decision, and the Court being fully advised in the premises and having made and caused to be filed its written findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED;

1. The petition for writ of mandate is denied.

2. The alternative writ of mandate is discharged.

3. Respondent is awarded its costs of suit incurred herein.

Dated: August 30, 1977

(Seal) Joseph A. DeCristoforo
Judge of the Superior Court

APPENDIX D

Certified for Publication

In the Court of Appeal
of the
State of California

First Appellate District

Division One

1 Civil 38277
(Sup. Ct. No. 461237-3)

Naismith Dental Corporation,
Plaintiff and Appellant,
v.
Board of Dental Examiners,
Defendant and Respondent.

[Filed Mar. 21, 1977]

OPINION

In an appeal from a judgment denying its petition for a writ of mandate, Naismith Dental Corporation (hereafter "Naismith") attacks the constitutionality of Business and Professions Code section 1658.1 on two grounds. It is contended that the statute operates to deny Naismith, and others similarly situated, "due process" and "equal protection."

Section 1658.1 provides:

"On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice,

except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry."

The relevant facts of the case are portrayed by the uncontroverted findings of the superior court, as follows:

"Petitioner is a California professional dental corporation and holds a Certificate of Registration as such issued by Respondent Board of Dental Examiners. All of Petitioner's outstanding shares of stock are owned by Richard T. Naismith, D.D.S., holding license No. 8902 issued by Respondent in 1941.[1] [¶] . . . Petitioner presently owns and operates one office in San Francisco and one office in Oakland. Each has been in continuous operation since prior to September 1, 1963. [¶¶] . . . Petitioner employs 14 dentists in Oakland and 7 in San Francisco, together with approximately 40 ancillary personnel. Dr. Naismith does not personally treat patients; rather he spends his time in professional supervision of the treating dentists and overall administration of the organization. [¶¶] . . . On May 2, 1974, Petitioner made application to Respondent for permission to open a third office in Stockton, California. On August 23, 1974, Respondent denied Petitioner's application for the sole reason that Petitioner admitted that Dr. Naismith would not be present at this third facility at least 50% of the time that it was open for the practice of dentistry."

---

[1]Only natural persons are eligible for licensing as dentists. (See Bus. & Prof. Code, §§ 1627, 1628; Corp. Code, § 13401.) Since 1968 a corporation may practice dentistry through licensed persons (see Corp. Code, §§ 13400-13410), and it must be "registered" as a professional corporation (see Corp. Code, § 13404).

We have read and considered the record and the briefs of the respective parties and amicus curiae. Our conclusion is that the judgment must be affirmed; the reasons follow.

I. We first consider Naismith's contention that section 1658.1 violates the state and federal "due process" clauses in that it is arbitrary, and has no reasonable relationship to any legitimate state purpose.

In determining whether legislation is violative of due process, courts "exercise an extraordinary power over a coordinate branch of government and perform a correspondingly narrow function: we simply determine whether the statute reasonably relates to a legitimate governmental purpose." (Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control, 65 Cal.2d 349, 359.) "The doctrine . . . —that due process authorizes the courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." (Ferguson v. Skrupa, 372 U.S. 726, 730.) Before a court may declare an act of the Legislature invalid because of due process or other constitutional conflict, "such conflict must be clear, positive, and unquestionable." (Varanelli v. Structural Pest Control Board, 1 Cal.App.3d 217, 220.)

And it appears to be the settled rule that "judicial examination of a statute under economic due process attack [as here] is completed when any fact or facts appear, or may be hypothesized, which the Legislature might rationally have accepted as the basis for a finding of public interest." (Varanelli v. Structural Pest Control Board, supra, 1 Cal.App.3d 217, 222; see also Doyle v.

Board of Barber Examiners, 219 Cal.App.2d 504, 514, and authority there collected.)

We observe that the ultimate responsibility for the care and treatment of patients of a dental office rests upon its proprietorship, whether a professional corporation, partnership or an individual. Advertising to section 1658.1, it is logically permissible to infer a valid public purpose that the proprietary and licensed head of such an office maintain a reasonably close and direct supervision over its professional employees and operations. This purpose may be given effect by a requirement that such proprietary and licensed head be in personal attendance at the office "at least 50 percent of the time" during which it is "open for the practice of dentistry." The foregoing, in our opinion, "might rationally have [been] accepted [by the Legislature] as the basis for a finding of public interest," and thus section 1658.1 was not in contravention of the "due process" clauses. We make no determination, of course, whether or not there were other valid reasons apparent to the Legislature from its expertise and study which it might likewise have accepted as bases for the statute.

We note also the provisions of title 16, section 1060, of the California Administrative Code: "The purpose of the rules of this article is to carry out the provisions of Article 3.5 [which includes Bus. & Prof. Code § 1658.1] of the Dental Practice Act and to facilitate, encourage and protect the public health. It is intended to preserve a close personal relationship between the applicant dentist and his patients at any additional office by preventing a division between the business and professional sides of the

said dental practice and by fostering a unity of ownership, management, and substantial direct proprietor supervision and control over the operative side of the practice." Although not binding on the courts, such a construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. (Coca-Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918, 921.)

We conclude that Naismith has not met the required burden of establishing the lack of any public purpose in the enactment of Business and Professions Code section 1658.1, and thus its denial of due process of law.

II. We turn now to Naismith's second contention—that section 1658.1 operates to deny it, and others similarly situated, equal protection of the laws.

We are aided by the state's high court's recent case of *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, and by Naismith's analysis of that and other authority, as follows:

"There are two tests employed in reviewing legislative classifications under the equal protection clause. The 'standard' test is the so-called 'rational relationship' test. It is applied in the review of economic and social welfare legislation ['] . . . in which there is a "discrimination" or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and "requires merely that distinctions drawn by a challenged statute bear some *rational relationship* [emphasis ours]

to a conceivable legitimate state purpose."['] (*D'Amico v. Board of Medical Examiners* (1974) 11 C 3d, 1, 16).

"A more stringent test [the "close scrutiny" standard] is applied where the criteria for classification is 'suspect' or where the classification touches on 'fundamental interests' (*Purdy & Fitzpatrick v. State of California* (1969) 71 C 2d 566, 578, 580; *Sail'er Inn v. Kirby* (1971) 5 C 3d 1, 16-20; *Raffaelli v. Committee of Bar Examiners* (1972) 7 C 3d 288, 291-94; *Brown v. Merlo* (1973) 8 C 3d 855, 861; *D'Amico v. Board of Medical Examiners* (1974) *supra,* 17). When *either* of these criteria are present the courts adopt an attitude of 'active and critical analysis, subjecting the classification to *"close scrutiny"* ' [this emphasis only is ours] (*D'Amico v. Board of Medical Examiners, supra,* 17). The burden is then placed upon the state to establish not only that it has a *compelling* interest which justifies the law, but that the classification itself is *necessary* to further its purposes (*D'Amico v. Board of Medical Examiners, supra,* 17)."

The trial court appears to have applied the "rational relationship" test. Naismith contends (1) that the "close scrutiny" test should have been applied but, (2) that even under the "rational relationship" test, the statute denies equal protection of the laws.

We are of the opinion that *D'Amico v. Board of Medical Examiners* has settled the question of which of its two criteria is applicable to the issue before us. The court there held that a "cognizable 'fundamental interest' in the right to pursue employment . . . is clearly limited in scope to 'the common occupations of the community' and should

not be applied to professions whose technical complexity and intimate relationship to the public interest and welfare counsel greater deference to the legislative judgment."[2] (11 Cal.3d, p. 18.) Clearly, under this holding and rationale, the practice of dentistry neither touches upon a "fundamental interest," nor is its legislative classification "suspect."

Accordingly, the trial court properly declined to apply the "close scrutiny" standard.

We therefore address ourselves to *D'Amico v. Board of Medical Examiners'* alternative test, whether the "distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.'" (11 Cal.3d, p. 16.) We find this test to differ in no substantial respect from the above-discussed requirement (see Varanelli v. Structural Pest Control Board, supra, 1 Cal. App.3d 217, 222) for statutory due process sufficiency, i.e., "when any fact or facts appear, or may be hypothesized, which the Legislature might rationally have accepted as the basis" for the statute. As we have pointed out above, section 1658.1 is in conformity with that requirement. It therefore follows that the statute meets the "rational relationship" criterion of *D'Amico v. Board of Medical Examiners.*

A related contention of Naismith is that no statute similar to Business and Professions Code section 1658.1 applies to the practice of medicine. It argues: "A legislative distinction between dentists and physicians *related* to their

[2]We find nothing in the context of, or elsewhere in, *D'Amico v. Board of Medical Examiners* which qualifies this language, as is suggested by Naismith.

respective qualifications or functions would be rational. A distinction between them not related to those inherent differences could be valid under equal protection only if the distinction in treatment could be shown to be related to some other demonstrable difference between them."

The contention is squarely answered by *Semler v. Dental Examiners*, 294 U.S. 608, 610, where the court found that Semler, also a dentist, had no "ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each." It has also been said by the high court that "A statute is not invalid under the Constitution because it might have gone farther than it did" (Roschen v. Ward, 279 U.S. 337, 339); and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (Williamson v. Lee Optical Co., 348 U.S. 483, 489). California's courts are in agreement: ". . . 'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.'" (In re Ricky H., 2 Cal.3d 513, 521-522; and see Norsco Enterprises v. City of Fremont, 54 Cal.App.3d 488, 498.)

III. Naismith produced expert professional testimony in the superior court which tended to impugn the wisdom, and the above-related purposes, of section 1658.1. But we

opine that determination of the wisdom and public purpose of such a statute is best left to the Legislature. Even though we were to agree with Naismith's, and its witnesses', view of the statute, unless we can "brand it as beyond the pale of reason" we may not find it in contravention of due process or the equal protection of the laws. "To do so would be to seriously erode our constitutional function." (See Schwalbe v. Jones, 16 Cal.3d 514, 523.) "Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (Estate of Horman, 5 Cal.3d 62, 77 [cert. den., 404 U.S. 1015].)

IV. Nor do we find merit in Naismith's contention that: "Any original validity Bus. and Prof. Code § 1658.1 had has been abrogated by changed conditions."

It is argued: "[T]he evidence showed and the Court found that there is a substantial and increasing public demand for direct service prepaid dental care [as is furnished by Naismith], and that the provision of such care is drastically limited by Bus. and Prof. Code § 1658.1. [¶¶] In the whole health care field only dentistry has been unable to keep abreast of the times, primarily because of the presence of Bus. and Prof. Code § 1658.1. Like the guest statute in *Brown v. Merlo* [8 Cal.3d 855], Bus. and Prof. Code § 1658.1 evolved at a time when the rendition of medical care was far different than it is now. Whatever justification it may have had years ago has long since disappeared, and so should it." The argument may have merit, but again it is our opinion that it would more properly be addressed to the Legislature. As previously suggested: "It is not our province to weigh the desirability of the

social or economic policy underlying the statute or to question its wisdom; they are purely legislative matters." (Allied Properties v. Dept. of Alcoholic Beverage Control, 53 Cal.2d 141, 146; Estate of Carlson, 9 Cal.App.3d 479, 485; Robinson v. Sacramento City etc. Sch. Dist., 245 Cal.App. 2d 278, 290.)

The judgment is affirmed.

Certified for Publication

Elkington, J.

We concur:

Molinari, P.J.

Sims, J.

Supreme Court, U. S.
FILED
DEC 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-878

JAMES W. GILMARTIN, GILMARTIN DENTAL CORPORATION AND J. W. GILMARTIN, D.D.S., INC.,

Petitioners

v.

BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent.

On a Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BRIEF FOR THE BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA IN OPPOSITION

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2—78603

IN THE

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Petitioners,

v.

BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent

On a Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BRIEF FOR THE BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA IN OPPOSITION TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The California Board of Dental Examiners respectfully opposes the Petition for Writ of Certiorari,

filed herein on December 1, 1978, to review the judgment of the Court of Appeal of the State of California in and for the Third Appellate District entered in the above entitled case on July 12, 1978.

OPINIONS BELOW

The denial of the Petition for Hearing by the Supreme Court of the State of California is unreported and is printed in Appendix A to the Petition for a Writ of Certiorari. The opinion of the Court of Appeal of the State of California in and for the Third Appellate District is unreported and is printed in Appendix B to the Petition for a Writ of Certiorari.

JURISDICTION

Jurisdiction is invoked by petitioners pursuant to 28 United States Code section 1257, subdivision (3).

QUESTION PRESENTED

The constitutionality of Business and Professions Code section 1658.1 on "due process" and "equal protection" grounds.

STATUTE INVOLVED

California Business and Professions Code section 1658.1 provides:

> "On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice, except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least fifty percent of the time during which such places of practice are open for the practice of dentistry."

The United States Constitution, Fourteenth Amendment, section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Pursuant to the provisions of California Business and Professions Code section 1658.1, a licensed dentist must obtain the written permission of respondent prior to opening any additional place of practice. Moreover, pursuant to California Business and Professions Code section 1658.1, no such authorization shall be granted unless the applicant dentist is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry.

On August 18, 1975, petitioners filed a Petition for Peremptory Writ of Mandate, Memorandum of Points and Authorities in Support of Petition for Peremptory Writ of Mandate and Notice of Motion for Peremptory Writ of Mandate in the Superior Court of the State of

California in and for the County of Sacramento.

On September 19, 1975, petitioners filed a Stipulation and Order taking petitioners' Motion for Peremptory Writ of Mandate off calendar.

On October 3, 1975, respondents filed a Return by way of Answer to Petition for Writ of Mandate and Alternative Writ of Mandate and Memorandum of Points and Authorities in Support Thereof.

On June 30, 1976, the Sacramento Superior Court ordered the trial continued for 120 days and ordered petitioners to file an application with respondent for a third office.

On July 20, 1976, petitioners made application to respondent for permission to open a third office to be located at 3018 J Street, Sacramento, California; a fourth office to be located at 7200 Hammer Lane, Stockton, California; and a fifth office to be located at 984 Lincoln Street, Auburn, California. On October 3, 1976, respondent denied petitioners' application because the petitioner, Dr. Gilmartin, would not be present in his third, fourth and fifth dental facilities at least fifty (50%) percent of the time that the office was open for the practice of dentistry.

On November 3, 1976, the trial proceedings continued and the matter was argued and submitted.

On November 8, 1976, the Sacramento Superior Court dropped the matter from the court's calendar pending the decision of the Court of Appeals First Appellate District in *Naismith Dental Corp.* v. *Board of Dental Examiners* (1977) 68 Cal.App.3d 253.

On June 9, 1977, the court on its own motion restored the matter to the court's calendar.

On June 28, 1977, the Sacramento Superior Court denied petitioners' Petition for Peremptory Writ of Mandate.

On July 1, 1977, petitioners filed a Notice of Request of Findings of Fact and Conclusions of Law.

On August 30, 1977, the court filed Findings of Fact and Conclusions of Law and its Judgment Denying the Petition for Writ of Mandate and discharging the Alternative Writ of Mandate.

On September 6, 1977, the court entered Notice of Entry of Judgment.

On September 16, 1977, petitioners filed a Notice of Appeal in the Court of Appeal of the State of California in and for the Third Appellate District.

On July 12, 1978, the Court of Appeal of the State of California, Third Appellate District issued its opinion affirming the Judgment of the Denial of the Peremptory Writ of Mandate. (See Appendix B attached to the Petition for a Writ of Certiorari.)

On September 7, 1978, the California Supreme Court denied the hearing in the matter entitled, *Gilmartin* v. *Board of Dental Examiners.* (See Appendix A attached to the Petition for a Writ of Certiorari.)

ARGUMENT IN OPPOSITION TO THE PETITION

ARGUMENT

I

THE NAISMITH CASE WAS CORRECTLY DECIDED

In the present action petitioners argue that Business and Professions Code section 1658.1 is unconstitutional because it violates the equal protection and due process clause of the United States Constitution. This issue was resolved against petitioners by the Alameda County Superior Court and affirmed by the Court of Appeal, First Appellate District in *Naismith Dental Corp.* v. *Board of Dental Examiners, supra*, 68 Cal.App.3d 253 and the Sacramento Superior Court and affirmed by the Court of Appeal, Third Appellate District in *James W. Gilmartin, et al.* v. *Board of Dental Examiners of the State of California.*

The *Naismith* court correctly ruled that there was not a denial of due process of law. The court reasoned as follows:

> "We observe that the ultimate responsibility for the care and treatment of patients of a dental office rests upon its proprietorship, whether a professional corporation, partnership or an individual. Adverting to section 1658.1, it is logically permissible to infer a valid public purpose that the proprietary and licensed head of such an office maintain a reasonably close and direct supervision over its professional employees and operations. This purpose may be given effect by a requirement that such proprietary

and licensed head be in personal attendance at the office 'at least 50 percent of the time' during which it is 'open for the practice of dentistry.' The foregoing, in our opinion, 'might rationally have [been] accepted [by the Legislature] as the basis for a finding of public interest,' and thus section 1658.1 was not in contravention of the 'due process' clauses. We make no determination, of course, whether or not there were other valid reasons apparent to the Legislature from its expertise and study which it might likewise have accepted as bases for the statute.

"We note also the provisions of title 16, section 1060, of the California Administrative Code: 'The purpose of the rules of this article is to carry out the provisions of Article 3.5 [which includes Bus. & Prof. Code § 1658.1] of the Dental Practice Act and to facilitate, encourage and protect the public health. It is intended to preserve a close personal relationship between the applicant dentist and his patients at any additional office by preventing a division between the business and professional sides of the said dental practice and by fostering a unity of ownership, management, and substantial direct proprietor supervision and control over the operative side of the practice.' Although not binding on the courts, such a construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. (*Coca-Cola Co.* v. *State Bd. of Equalization*, 25 Cal.2d 918, 921.)" (*Naismith Dental Corp.* v. *Board of Dental Examiners, supra*, 68 Cal.App.3d 253 at pp. 259–260.)

EQUAL PROTECTION ANALYSIS BY NAISMITH COURT

The *Naismith* court applied the "rational relationship" test because in the court's opinion the practice of dentistry neither touches upon a fundamental interest nor is its legislative classification "suspect".

Under the criterion established by *D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1 the court concluded that Business and Professions Code section 1658.1 bears some "rational relationship to a conceivable legitimate state purpose." (*Naismith Dental Corp.* v. *Board of Dental Examiners, supra,* 68 (Cal.App.3d 253.)

Appellant in *Naismith* argued, as petitioner Gilmartin argues here, that there is no rational basis for distinguishing between dentists and other healing arts with respect to the number of offices the practitioner may operate. The *Naismith* court relied on this court's decision in *Semler* v. *Oregon State Board of Dental Examiners* (1934) 294 U.S. 608 as follows:

> "The contention is squarely answered by *Semler* v. *Dental Examiners*, 294 U.S. 608, 610 [79 L.Ed. 1086, 1089, 55 S.Ct. 570], where the court found that Semler, also a dentist, had no 'ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each.' It has also been said by the high court that 'A statute is not invalid under the Constitution because it might have gone farther than

> it did' (*Roschen* v. *Ward*, 279 U.S. 337, 339 [73 L.Ed. 722, 729, 49 S.Ct. 336]); and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 [99 L.Ed. 563, 573, 75 S.Ct. 461]). California's courts are in agreement: '. . . "The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident." ' (*In re Ricky H.*, 2 Cal.3d 513, 521–522 [86 Cal.Rptr. 76, 468 P.2d 204]; and see *Norsco Enterprises* v. *City of Fremont*, 54 Cal.App.3d 488, 498 [126 Cal.Rptr. 659].)" (*Naismith Dental Corp.* v. *Board of Dental Examiners, supra*, 68 Cal.App.3d 253 at p. 262.)

The rationale of the *Naismith* decision is controlling. It is not for a court to question the wisdom of Business and Professions Code section 1658.1. The determination of the wisdom and public purpose of a statute are best left to the Legislature. Petitioners' arguments are properly addressed to the Legislature, not this court.

II

THE APPLICABLE EQUAL PROTECTION ANALYSIS IS THE RATIONAL RELATIONSHIP TEST

In reviewing the constitutionality of economic and social welfare legislation, courts have applied two tests. The first is the rational relationship test.

This test manifests restraint by the judiciary in

relation to the discretionary act of a co-equal branch of government and thereby invests such legislation with a presumption of constitutionality and requires merely that classifications drawn bear some rational relationship to a conceivable legitimate state purpose. So long as such classifications do not permit one to exercise a privilege while refusing it to another of like qualifications, under like conditions and circumstances, they are not objectionable under equal protection standards. (*D'Amico* v. *Board of Medical Examiners*, *supra*, 11 Cal.3d 1, 16.) "Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it.*" (*Id.* at p. 17.) (Court added emphasis.)

This test is traditionally applied in cases involving occupational licensing, including those concerning the healing arts. (*Id.* at p. 17.)

The second test is the strict scrutiny test. Here, the courts adopt an attitude of active and critical analysis. This test is applied in cases involving suspect classifications or touching upon fundamental interests. Moreover, the state bears the burden of establishing that it has a compelling interest which justifies the law and that the classifications drawn are necessary to further its purpose. (*Id.* at p. 17.)

Petitioners, here, assail Business and Professions Code section 1658.1. That section provides:

> "On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice, except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry."

The class of persons that statute applies to is dentists. That classification is based upon the type of licensure held (see Bus. & Prof. Code § 1658), which in turn is based upon the type and content of education attained. (See Bus. & Prof. Code § 1628: Eligibility of Applicant for Licensure.) The classification involved here is one of professional licensure and the statute applies equally to all members of the classification.

The *Naismith Dental Corp.* v. *Board of Dental Examiners*, *supra*, 68 Cal.App.3d 253 court held there were no fundamental interests or suspect classifications involved and applied the rational relationship test. (*Naismith*, *supra*, at pp. 261–262.)

Petitioners contend that it was erroneous to apply this test and that the applicable standard of review was the strict scrutiny test.

Petitioner, Dr. Gilmartin, is subject to the operative effect of Business and Professions Code section 1658.1 solely by virtue of his occupational license as a dentist.

Equally without merit is petitioners' contention that in determining the appropriate constitutional standard, the inquiry should be whether the right is vested not fundamental.

The applicable analysis for determining the appropriate equal protection standard in defining a fundamental interest is set down by this court in *San Antonio School District* v. *Rodriquez* (1973) 411 U.S. 1, 36.

This court held that in determining if a right claimed is fundamental so as to involve strict scrutiny the court must determine whether such right is explicitly or implicitly guaranteed by the Constitution. (*Id.* at p. 33.)

It is respectfully submitted that there is no right explicitly or implicitly guaranteed by the Constitution to expand one's dental practice nor have petitioners directed this court to any such particular portion of the Constitution.

There is a rational basis for Business and Professions Code section 1658.1. The ultimate responsibility for the care and treatment of dental patients rests upon the dental office proprietor. Thus, it is a valid public purpose for the Legislature to require the proprietary and licensed head of such an office to maintain reasonably close supervision over its operations and professional employees. This purpose is given effect by the requirement that such proprietary and licensed head be in personal attendance at the office "at least 50 percent of the time" during which it is "open for the practice of dentistry."

III

PETITIONERS HAVE NOT BEEN DENIED DUE PROCESS BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 1658.1

In determining the constitutionality of regulatory legislation under due process consideration when any fact or facts appear or may be hypothesized which the Legislature might rationally have accepted as the basis

for a finding of public interest, the statute meets the test of reasonableness. (*Varanelli* v. *Structural Pest Control Board* (1969) 1 Cal.App.3d 217, 222 and cases cited therein.)

Moreover, before the court declares the act of a coordinate branch of government unconstitutional, such conflict must be clear, positive and unquestionable. (*Varanelli* v. *Structural Pest Control Board, supra,* 1 Cal.App.3d 217 at p. 220; *Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 358–359.)

This court's recent decision in *Idaho Dept. of Employment* v. *Smith* (1977) 98 S.Ct 327, is of interest. In that case this court held that an Idaho statute granting unemployment benefits to night students, but denying such benefits to otherwise eligible persons who attend school during the day, did not deny equal protection. This court stated as follows:

> "The holding below misconstrues the requirements of the Equal Protection Clause in the field of social welfare and economics. This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits: 'If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ' *Dandridge* v. *Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970), quoting *Lindsley* v.

Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *Mathews* v. *DeCastro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); *Jefferson* v. *Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972). The legislative classification at issue here passes this test. It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night. In a world of limited resources, a State may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school. Moreover, the classification serves as a predictable and convenient means for distinguishing between those who are likely to be students primarily and part-time workers only secondarily and thus ineligible for unemployment compensation and those who are primarily full-time workers and students only secondarily without the necessity of making costly individual eligibility determinations which would deplete available resources. The fact that the classification is imperfect and that the availability of some students desiring full-time employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited *supra*, render the statute invalid under the United States Constitution." (*Idaho Dept. of Employment* v. *Smith*, *supra*, 98 S.Ct. 327 at p. 328.)

This court should defer to the legislative determination concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits.

CONCLUSION

The Court should Order that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DATED: DEC 26 1978

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